



# Nez Perce

## Tribal Executive Committee

PO Box 305 Lapwai, Idaho 83540 (208)843-2253

Marlene H Dortch, Secretary

Federal Communications Commission

445 12<sup>th</sup> Street, SW

Washington, DC 20554

RE: Nez Perce Tribe *ex parte* presentation of comments (WT Docket 11-40: Notice of Proposed Rulemaking - Improving Communications Services for Native Nations by Promoting greater Utilization of Spectrum over Tribal lands)

Dear Secretary Dortch,

The Nez Perce has been deploying tribally owned and operated fixed wireless broadband network since 2008. We recognize the importance of providing broadband telecommunications to serve our members, for public safety, healthcare and education. The Nez Perce Tribe is committed to meet the communications needs of those living on and adjacent to the Reservation.

The following are comments provided *ex parte* to the Federal Communication Commission regarding WT Docket 11-40:

### A.1. Tribal Lands

The Nez Perce Tribe concurs with the proposed definition of Tribal lands as "any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act, and Indian allotments."

### A.2. Wireless Services Subject to Tribal lands program

The Nez Perce Tribe supports and encourages the inclusion of Educational Broadband Service (EBS) in this rulemaking process. In addition, we encourage the commission to enable Tribes to be designated as eligible EBS spectrum assignees.

In regard to whether licensing models for service should be treated differently or excluded, it is the Nez Perce Tribe's position that any and all spectrum within its reservation be available and prioritized for

utilization by the tribe for providing essential services connected to education, public safety, healthcare and economic sustainability.

#### B.1. Eligibility and legal authority

The Nez Perce Tribe concurs with the definition of qualifying Tribal entities to include: Tribes, tribal consortia, and tribal business with at least 50% ownership by a Tribe or tribes.

In regard to the question of whether there should be limits on Tribal entity eligibility to having a geographic connection to the area, we suggest that spectrum be made available for award to Tribes within their historic, usual and accustomed use geographies. Furthermore, we suggest that consortia of Tribes be eligible and that in such an instance at least one of the tribes within the consortia be required to be geographically connected to the region which spectrum is sought.

We concur with the Commission recognition that the legal foundation for providing opportunity for Spectrum access to Tribes is in accordance with its federal trust relationship and that of the Communications Act of 1934, that Tribes have adequate access to communication services. We believe the trust relationship justifies the Tribal priority for spectrum assignment and award to the defined Tribal eligible entities referenced.

Tribal consortia, enterprises, and third party partnerships should ensure retained 51% tribal ownership to meet the established criteria provided within the Commission attribution rules.

#### B.2. Defining unserved and underserved

Across Tribal areas the complexities of geographies are great; in many places coverage may be up to or exceed 85% within the more urban markets, while the more rural and remote regions where people reside, gather, hunt and where public safety is a concern are not covered. It is often in these more rural/remote places where coverage is critical in emergency management situations. Considering the vast and diverse geographies of Tribal places we suggest the definition be applied to the entire licensee area and have a minimum of 85% coverage as a threshold.

We recognize and support the Commission efforts to encourage competition in the marketplace. In regard to the definition of underserved, we strongly urge the Commission to include language that would indicate service even that available at the 85% coverage level, but by only one provider to be considered underserved.

#### B.3. Defining geographic area for which Tribal Access to spectrum opportunities

We recognize the need for limitations in licensing and the need to define specific license area. We also recognize the complexities of the definition of place across Indian country geographies. In terms of establishing geographic limitations we encourage the Commission to prioritize the area within the bounds of established Reservations; Ceded territories; area of usual and accustomed use in regard to the establishment of Tribal priority for spectrum award.

In the case where a tribal consortia were the applicant, we suggest the Commission consider the eligible geographic area include and extend to the boundaries of the license tribal coverage location to also include in priority a Reservation; any Ceded territory; and areas of usual and accustomed use in regard to geographic area of eligibility.

By extending the eligible geographic areas near and adjacent to Reservation boundary(ies) the Commission will be enabling Tribes to better attain their communication goals to best serve its members.

In establishing licensee areas it will be important to establish technical guidelines on the coordination of spectrum frequency to limit interference issues. We encourage the Commission to identify sound technical interference limit guidelines.

### C Tribal licensing priority for unassigned wireless radio service licenses

We believe the development of a tribal priority for unassigned fixed and mobile wireless service spectrum over tribal lands included in the NPRM Docket 11-40 will enhance Tribes' ability to serve the communication needs of its member.

In particular, we wish to further express support for expanding eligibility to Tribal access to Education Broadcast Spectrum.

#### C.1. Process and licensing framework

Due to the inherent nature of tribal lands and the rural/remote nature of these lands it is most likely applicants with a true intent to cover and provide service will be limited, given the herein proposed coverage/build out recommendations. However, in the case(s) where competing or mutually exclusive license applications are sought, it would bring the greatest benefit to encourage negotiation, engineering solutions and threshold qualifications in relationship to a Tribal priority licensing situation. Competitive bidding is seen as a least favorable option for addressing mutually exclusivity across Tribal lands.

We support a Tribal priority where all spectrum covered under NRM Docket 11-40 deemed available would be first offered in a Tribal application window, for eligible Tribal entities, prior to being made available to non-tribal applicants.

### D. Processes for providing access to spectrum licensed to third parties

D.1. Enabling Tribes the ability to negotiate with spectrum licensees for partitioning across Tribal lands would be a positive move towards Tribes resource availability to providing communication services to its members. Where non-tribal licensees hold spectrum over tribal land but choose not construct to serve due to limited market opportunity (Return on investment) an eligible Tribal entity should have the ability to negotiate to partition the license and put the spectrum to use serving the communication needs of its members.

In establishing negotiation ability, it will be critical to establish rules of engagement. We support the development of negotiation standards to address licensees with spectrum but who choose to not provide service over tribal lands. We support the identified proposed rules of engagement in NPRM Docket 11-40.

We support that partitioned spectrum license resulting from good faith negotiations would be subject to Commission rules and construction requirements.

## D.2. Build or Divest

The Nez Perce Tribe strongly supports a build or divest opportunity within the auspices of a Tribal priority access to spectrum for fixed and mobile wireless communication. In a build or divest process, a Notice of Intent should include documentation of good faith negotiations for partitioning or secondary market lease options had failed; the specific land area; to the best ability available include testimony or proof of lack of service in the target area; and an implementation plan for build out with timetable.

Performance requirements should attain the proposed 85% coverage within the defined service area, herein; and within the established three year window.

It is recognized that to maintain the quality of service delivery capacity, Tribes successful and eligible to initiate Notice of Intent in a divestment scenario demonstrate that it meets the Communication Act requirements for licensee. If a Tribe has an established relationship with a third party, who may not be eligible under the Communications Act the Commission should encourage partnerships and resource leveraging as it relates to facilitating a Tribes ability to acquire service coverage across its reservation lands with third party agreements. However, to maintain credibility and sustainability the Commission could require the Tribe full responsibility in deployment and sustainability of the network across its lands. In the situation where a Tribe enters into a partnership with a third party the responsibilities under the Communications Act would fall on the licensed Tribe; the third party would simply be a mechanism to deploy technology thus bolstering the Tribes' ability to meet the communication needs of its members.

## E. Construction Safe Harbor

Due to the nature of Tribal lands, often remote and rural (Frontier communities) establishing a blanket coverage percentage based on area covered should include an up front consultation with Tribes to identify areas of priority for coverage. Through the engagement process licensees should follow an established Rules of Engagement process to insure due diligence on both the licensee and Tribe. A standard of 85% coverage should be adopted as a fall back to failed negotiations in area prioritization.

To reduce the risk of provider fraud, the permit for Safe Harbor by a provider should include an automatic build or divest where the spectrum license would automatically be provided to the Tribe following the prescribed three year construction window.

It is not recommended that the Commission establish a construction multiplier as an incentive. Such a multiplier would enable partial deployment across Tribal lands and likely reduce coverage in the areas least populated where access to broadband and mobile coverage would be most directly related to public safety and emergency response.

## F. Modification to Tribal Lands Bidding Credit program

The Tribal Lands Building Credit (TBLC) program is a solid incentive package for licensees willing to build out on Tribal lands. We would recommend no modifications to the TBLC; given the enclosed proposals are adopted. Assuming adoption of the enclosed proposals regarding a Tribes ability to file for partitioning; to initiate a build or divest process; and enable Tribes to facilitate build out partnerships with third party entities; and Safe Harbor provisions. With adoption of these expanded tools, the TBLC

as it is written would provide substantial incentive to sincere licensees to build out and attain 85% coverage across Tribal lands within the established three year window.

The Nez Perce Tribe has over the past ten years proactively reached out to establish partnerships with private spectrum licensees to facilitate build out of mobile access across the Reservation. The success of these efforts has been primary with small regional providers; while we know large providers hold spectrum over our lands we have not been successful in establishing relationships to facilitate deployment in the more rural/remote regions of our lands.

We believe adoption of WT Docket 11-40 will further facilitate greater utilization of spectrum over tribal lands.

Respectfully,



Silas Whitman, Chairman



Brooklyn Baptiste, Secretary